PRE-EMPTION AND THE LABOR REFORM ACT—DUAL RIGHTS AND REMEDIES

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Labor lawyers have learned from experience the inherent complexity of law-making in a federal system and the difficulties of anticipating the problems created by radiations of national regulation. *Hill v. Florida*,[1] which held that a state statute licensing business agents conflicted with national protection of employees' free choice of bargaining representatives, demonstrated the reach and destructive power of those radiations. *Bethlehem Steel Co. v. New York State Labor Relations Board*,[2] which barred New York from certifying a bargaining unit of foremen, suggested the presence of invisible radiations from denial of national protections. Congress in 1947 could not foresee, however, the problems projected by these decisions, particularly when federal law was changed from the unilateral limitations of the Wagner Act to the bilateral limitations of Taft-Hartley.[3] The still-born cession clause of section 10(a) and the piecemeal provisions of section 14 proved wholly inadequate.[4] Comprehensive national regulation carried unexpected implications for state law. *Garner v. Teamsters Union*[5] found in the picketing provisions an implied prohibition of state restraints; and *Guss v. Utah Labor Relations Board*[6] held that the cession clause designed to encourage cooperation between federal and state governments created a "no man's land" between them. The "Delphic nature"[7] of Congressional silence has worked unexpected results,[8] and the "process of litigating elucidation"[9] has shed but a

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1 325 U.S. 538 (1945).

2 330 U.S. 767 (1947).

3 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1958).

4 Section 14(a) related only to state laws requiring employers to treat supervisors as employees for purposes of collective bargaining, writing into the statute the pre-emptive result of Bethlehem Steel Co. v. New York State Labor Relations Board *supra* note 2; and § 14(b) related only to state laws prohibiting the execution and enforcement of union security agreements, expressly freeing such laws from pre-emption.

5 346 U.S. 485 (1953).

6 353 U.S. 1 (1957).

7 IAM v. Gonzales, 356 U.S. 617 (1958).

8 Even § 14(b) was found insufficient to preserve to the states the power to enjoin picketing whose purpose was to obtain an exclusive hiring hall agreement in violation of the state right to work law. Farnsworth & Chambers Co. v. Local 429, IBEW, 353 U.S. 969 (1957).

9 IAM Gonzales, *supra* note 7.

faltering light[10] revealing in many areas only the hazards that lie ahead.[11]

Congress, in developing legislation on internal union affairs, was constantly reminded of the problem of pre-emption. Proposals to regulate unions with new laws were accompanied by efforts to fill the "no man's land" produced by past laws.[12] This served as a stern reminder that faulty federal legislation intended to fill a need could create a vacuum. Union spokesmen repeatedly declared that there existed a substantial body of state law prohibiting union abuses and protecting members rights.[13] At the same time, *IAM v. Gonzales*,[14] challenging the power of a state court to award damages to a member who had been expelled for suing a union officer, was in the Supreme Court. This dramatized the danger that provisions designed to protect members might unwittingly destroy valuable remedies under state law.

The major proposals which served as a focus for debate in 1958 and 1959 reflected two different approaches to the problem. The Kennedy-Ives Bill[15] sought to tailor pre-emption to the particular subject regulated, and to coordinate federal and state remedies to create a comprehensive whole. Thus, the reporting title contained a clause

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10 The full import of United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954), was uncertain for five years. Some clarity was provided by UAW v. Russell, 356 U.S. 634 (1958), which in turn created its own cloud of confusion. Only with San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), were these cases fully illuminated and revealed as involving simply state regulation of violence and public order—light which at least four members of the court apparently had not previously seen. The manifold implications of the pre-emption cases have been comprehensively explored in Meltzer, "The Supreme Court, Congress and State Jurisdiction Over Labor Relations," 59 Colum. L. Rev. 6 (1959).

11 The Garmon case, *supra* note 10, has brought to the fore as a crucial element in pre-emption the primary jurisdiction of the NLRB to determine what activity is protected or prohibited. This may cast the pre-emption problem in a new perspective with unanticipated results. See Wellington, "Labor And The Federal System," 26 U. Chi. L. Rev. 542 (1959).

12 See, *e.g.*, S. 3099, 85th Cong., 2d Sess. § 9 (1958) (Administration Bill); S. 3974, 85th Cong., 2d Sess. § 602 (1958) (Kennedy-Ives Bill); S. 505, 86th Cong., 1st Sess. § 601 (1959) (Kennedy-Ervin Bill); S. 1555, 86th Cong., 1st Sess. § 601 (1959) (Senate Committee Bill).

13 Statement of George Meany, President of the AFL-CIO, "Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate," 85th Cong., 2d Sess. 68 (1958) (hereafter cited as Senate Hearings [1958]); Statement of George M. Harrison, Grand President of the Brotherhood of Railway & Steamship Clerks, *id.* at 1189; Statement of A. J. Hayes, President of the International Association of Machinists, "Hearings Before the Committee on Education and Labor, House of Representatives," 86th Cong., 1st Sess. 1392-95 (1959) (hereafter cited as House Hearings [1959]).

14 *Supra* note 7.

15 S. 3974, 85th Cong., 1st Sess. (1958).

barring states from requiring unions to file duplicating reports, but requiring the Secretary of Labor to supply states with free copies.[16] The trusteeship title expressly preserved state remedies, but sought to avoid a clash of federal and state remedies by providing "That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be res adjudicata."[17] The election article avoided a clash by expressly pre-empting state law in the election area with the provision, "The duties imposed and the rights and remedies provided in this Act shall be exclusive."[18]

In sharp contrast, the Administration Bill[19] made no attempt to define the relative roles of state and federal law, but was designed only to avoid weakening any possible protections under state law. The fiduciary section had an all-inclusive savings clause stating that "Nothing in this section shall reduce or limit the duties of responsibilities of any officer . . . of a labor organization under . . . the law of any state . . ."[20] In addition, a general savings clause provided that nothing in the title "shall be construed to supersede or modify any existing rights and remedies of a union member under the law of any state."[21]

The extent to which state law should be pre-empted became a significant, though subsidiary, issue in the eighteen months of debate leading up to the passage of the Labor Reform Act. The unions from the outset vigorously urged that any federal law should displace state law, and that unions ought not be subjected to dual sanctions.[22] The broad savings clause in the Administration Bill was termed its "most offensive provision" by Arthur Goldberg, special counsel for the AFL-CIO;[23] and President George Meany declared that a similar clause "reflects simply a diffused bias against unions and in favor of states rights."[24] Others, however, warned of the dangers inchoate in dis-

16 S. 3974, 85th Cong., 1st Sess. § 104(c) (1958).

17 S. 3974, 85th Cong., 1st Sess. § 206 (1958).

18 S. 3974, 85th Cong., 1st Sess. § 303 (1958).

19 S. 3097, 85th Cong., 2nd Sess. (1958).

20 S. 3097, 85th Cong., 2nd Sess. § 204 (1958).

21 S. 3097, 85th Cong., 2nd Sess. § 402 (1958). Other bills had equally board provisions saving state law. See S. 3068, 85 Cong., 2nd Sess. §§ 407(d), 408(b) (1958) (Senator Knowland).

22 Statement of George M. Harrison, Senate Hearings (1958), *supra* note 13, at 1189; Statement of A. J. Hayes, Senate Hearings (1958), *supra* note 13, at 1395; Statement of Andrew J. Biemiller, Department of Legislation, AFL-CIO, "Hearings Before the Subcommittee on Labor of Committee on Labor and Public Welfare, U.S. Senate," 86th Cong., 1st Sess. 72 (1959) (hereafter cited as Senate Hearings [1959]).

23 Senate Hearings (1959), *supra* note 22, at 580.

24 House Hearings (1959), *supra* note 13, at 1496. This statement was with reference to the broad savings clause which is now § 603(a) of the act. For other statements of similar tenor concerning other savings clauses now in the act, see pp. 1493, 1565.

placing state remedies with limited federal legislation.[25] For example, when the Kennedy-Ives Bill passed the Senate in 1958 with a provision making federal remedies exclusive in union elections, the American Civil Liberties Union (ACLU) pointed out that this would bar existing state remedies to correct misconduct prior to an election, without providing any equivalent federal remedies. It might also pre-empt states in related areas such as enjoining expulsion of a member for distribution of campaign pamphlets or removal of local officers by the international without a hearing.[26] Professor Cox underscored this danger and urged a narrower pre-emption clause.[27]

Congressional fear of destroying valuable state remedies without providing adequate federal substitutes, and the spectre of creating a new "no man's land," routed all objections toward overlapping and possibly conflicting remedies. The statute became studded with assorted provisions cut from different patterns. The trusteeship and elections titles each contained specially tailored provisions derived from the Kennedy proposals;[28] the reporting title retained its specific pre-emption of state reporting requirements;[29] but the Bill of Rights broadly declared that nothing in it should "limit the rights and remedies" of any union member "under any State or Federal law."[30] The dominant congressional mood, however, was expressed in section 603(a), which was applicable to all titles:

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

These provisions are unique in federal legislation. They attempt to deal explicitly with the problem of pre-emption, but more importantly they contemplate the coexistence of federal and state law applicable to the same subject. This inevitably presents serious problems

25 Statement of Professor Clyde W. Summers, Senate Hearings (1958), *supra* note 13, at 606, 609, 612, 613.

26 ACLU Statement, July 13, 1958. Reprinted in "A Labor Union Bill of Rights, Democracy In Labor Unions, The Kennedy-Ives Bill, Statements by ACLU," (Sept. 1958).

27 Senate Hearings (1959), *supra* note 22, at 113, 135-36.

28 See § 306 (trusteeship); § 403 (elections). The text of these provisions is quoted in full as each is discussed in detail in the paper.

29 Section 205(c).

30 Section 103.

of coordinating the two bodies of law and avoiding a clash of remedies. The purpose here is not to discuss the wisdom of the congressional choice, but only to explore what Congress has done. This may make more clear the size and shape of the problems of coexistence and provide a better base for critical evaluation.

Each title of the act presents its own problems, not only because the pre-emption provisions are different, but because the substantive provisions and the cases which arise take quite different forms. Therefore, the problems arising under each title must be examined separately, though in the context of the entire act. Few relevant cases have yet been decided, nor can cases under other statutes provide any substantial guide. We can only attempt to fit the statute to cases yet unborn, and our analysis is limited by our ability to foresee their form.

TITLE I—BILL OF RIGHTS

When Senator McClellan presented his Bill of Rights on the Senate floor, the problem of pre-emption became a central issue in the debate. Senator Kennedy's major objection was that:

> if the proposal were enacted, the present rather exhaustive remedies under the common law of various states might be wiped out, and only the rights suggested by the Senator from Arkansas would then be available to union members.[31]

He repeatedly stressed that the states had provided "broad protection for members," in some respects broader than the provisions in the Bill of Rights,[32] and that "we should make sure that we shall be better off after the amendment is adopted than we are today."[33] In response to this argument, Senator Holland declared:

> I am sure no Senator would want to take away from any labor union member . . . any rights or protections they have under the laws of the State. . . .
>
> Is it not true that a plenary provision guarding against pre-emption, such as suggested by the Senator from Arkansas, would completely guard against any such surrender of rights? Would it not make clear that all rights—and the rights may vary in the different states—would be preserved. . . .[34]

Senator Kennedy then raised the question, "which would govern, the Federal or the State law?" To this Senator Holland's answer was simple and unequivocal, "I would say that both rights would prevail,

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[31] 105 Cong. Rec. 5816 (daily ed. April 22, 1959).

[32] 105 Cong. Rec. 5817-21 (daily ed. April 22, 1959).

[33] 105 Cong. Rec. 5817 (daily ed. April 22, 1959).

[34] *Ibid.*

that both courts would be available, and both remedies would be available."[35]

As a result of this discussion, Senator McClellan added to his amendment such a "plenary provision guarding against pre-emption," identical with present section 603(a).[36] Later, when the Kuchel version of the Bill of Rights was substituted, it included section 103, which unchanged, provides:

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal or under the constitution and by-laws of any labor organization.

This provision was the product of three dominant themes which ran through the debate on title I. First, Congress was concerned with the rights of the union member within his union. It sought to increase his rights and add to their protection from union restraint; it did not seek to increase rights in the union against its members. The statutory language itself speaks for member's rights: "Every member . . . shall have equal rights . . .";[37] "Every member . . . shall have the right to meet and assemble freely . . .";[38] and no union "shall limit the right of any member thereof to institute an action. . . ."[39] Section 103, in saving state law, carries this same unilateral thrust. It does not purport to save all state law. It seeks to guard the rights and remedies of union members, but it does not preserve their duties and liabilities. Congress sought to give union members the maximum protection available under state and federal law.

Second, Congress did not conceive of this title, nor the statute as a whole, as a comprehensive code defining the rights of union members. Rather, it sought to establish certain basic rights as a minimum standard of decency guaranteed by the federal government. In response to a question by Senator Butler, both Senator Kennedy and Senator Kuchel emphatically denied that by enumerating certain rights others

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[35] *Ibid.*

[36] 105 Cong. Rec. 5822 (daily ed. April 22, 1959). This was added without objection, even though its applicability was not limited to title I, but reached the whole act. During the debate on this title no one except Senator Kennedy raised questions about or argued against dual rights and remedies. Senator Kennedy also expressed concern that this savings clause "would upset the carefully prepared provisions in regard to secret elections and trusteeships, as those provisions now appear in the bill." 105 Cong. Rec. 5826 (daily ed. April 22, 1959). No explanation of the basis for this concern was given.

[37] Section 101(a)(1).

[38] Section 101(a)(2).

[39] Section 101(a)(3). Each of the sections contain provisos permitting unions to qualify these rights. These provisos, however, are not worded to create duties in the members but only to limit the reach of federally protected rights.

were excluded or in any way abridged.[40] The last clause of section 103, preserving all of the members' rights under the union's constitution, was added to make doubly clear that the declaring of a federal minimum did not impliedly bar the states from giving union members added or different protection.[41]

Third, Congress deliberately rejected secondary considerations which weigh in favor of pre-emption. Senator Kennedy pointed out that the savings clause would create dual remedies in federal and state courts,[42] but those supporting the Bill of Rights saw two available remedies as better than one, permitting the aggrieved member's shopping for the most favorable forum as a part of maximum protection. Senator Morse later decried the lack of uniformity which would result,[43] but this was openly admitted and accepted as inherent in establishing a federal minimum.[44]

The critical objection, made by Senator Kennedy and others, that the coexistence of two bodies of law would create conflicts, was never squarely faced. The objections, made in the general terms, never pointed out specific instances which would arise but seemed to express fears of the unknown. Those advocating the broad savings clause apparently felt either that the dual protections would not in fact conflict, or that the courts could resolve the problems as they arose. It is to this potentiality of conflict which we must now turn.[45]

The dominant themes of congressional intent by their very nature prevent any conflict between federal and state law in most cases, for the union can quite readily recognize individual rights under both. A Negro who is relegated to an auxiliary local may have no right under state law to attend and vote at union meetings, but he has a right under the equal rights clause of the statute to full and equal participation. No conflict exists, for the union's power under state law to discriminate is not preserved by section 103 and the federal right prevails. A member expelled by a majority vote when the union constitution requires a

40 105 Cong. Rec. 6023-24 (daily ed. April 22, 1959).

41 105 Cong. Rec. 6024, 6025-26 (daily ed. April 22, 1959).

42 105 Cong. Rec. 5816, at 5818 (daily ed. April 22, 1959).

43 105 Cong. Rec. 16386 (daily ed. Sept. 3, 1959). This was part of his sweeping attack on the conference bill.

44 *Supra* note 33.

45 If title I had been cast in terms of prohibitions imposed on unions, enforceable by criminal sanctions, the problem of conflict would have appeared much simpler. Dual criminal prohibitions are commonplace, and both must be obeyed, even though one is more restrictive than the other. Conflict arises only if one affirmatively commands that which the other prohibits. In such cases it is clear that the state cannot punish that which is required by federal law. Title I, though cast in terms of individual rights, fixes a minimum standard of conduct for unions and operates much as a prohibition on unions.

two-thirds vote may have a state cause of action, but no federal cause of action; and if his expulsion is for criticizing the officers, he may have a cause of action under both laws. The federal and state rights coexist, and either or both can be enforced without conflict. Congress clearly intended that one should have dual remedies so as to provide maximum protection.[46]

Conflict could arise if Congress at any particular point manifested a specific intent to protect affirmatively the union's freedom of action against its members. Conceivably, the various provisos might be so construed. For example, section 101(a)(4) protecting the right to sue provides that "any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four month lapse of time) within such labor organization." It might be argued that Congress intended to protect union procedures for self-correction and that for a state to intervene without requiring such exhaustion would conflict with this congressional intent.[47] Similarly, it might be argued that for a state to protect freedom of speech beyond the limitations expressed in the proviso in section 101(a)(2) would violate a national policy of permitting unions this degree of internal discipline. So construed, these provisos would limit rights under state law. The legislative history of title I, however, shows no congressional concern beyond limiting the range of federal protection of the basic rights, and the explicit words of section 103 militate strongly against such a construction.

Because title I is cast in terms of rights of members rather than prohibitions on unions, conflict may arise if one member claims rights under state law and another member claims competing rights under federal law. Thus, one member might claim that under the union constitution, enforced by state law, his dues could not be increased except by a two-thirds vote of his elected officers and not by a plebiscite. Another member could claim that under section 101(a)(3) his dues could be increased only by a membership vote. Both assert individual rights to a democratic process, but the claims clash and the courts must resolve the conflict. The constitutional provision could be treated as void under section 101(b), and thereby eliminate the source of the state right. Although logically neat, the effect is to use this section to destroy existing rights under state law contrary to section 103. The alternative is to require that both processes be followed; in other words, that the

[46] Some of the procedural problems raised by the availability of dual rights and remedies are discussed *infra*.

[47] Senator Kennedy, in explaining the conference bill, made clear that this proviso did not invalidate state court decisions which did not require exhaustion of internal remedies because of circumstances of the case. 105 Cong. Rec. 16415 (daily ed. Sept. 3, 1959).

dues increase be voted by the executive board and ratified by referendum. The individual might claim, however, that the combined process which divides responsibility is actually a third process which destroys his right to responsible executive board control. Regardless of section 103, that right no longer exists for the statute has required otherwise. In choosing between available alternatives, the courts must not look to verbal logic but to the practical consequences of their choice. To preserve the union's procedure saves the maximum of state rights with a minimum of disruption. If the union dislikes divided responsibility, it can amend its constitution.

In some cases the clash of competing individual rights may be even sharper. For example, a statement made by one union member against another may be defamatory under state law but fair comment under the free speech section of the federal law. The aggrieved member may file charges under the discipline clause prohibiting slandering a union member and argue that section 103 saves his rights under the union constitution not to be slandered. At the same time the accused can insist on his rights under section 101(a)(2) to make these statements. This conflict might be submerged by reading section 103 as preserving only a member's rights against the union and not his rights against other members, but if the aggrieved sues the union for failing to take disciplinary action, further word whittling will be required.[48] The conflict might again be neatly resolved by reading section 101(b) as invalidating the discipline clause to the extent that it encroached on the right of free speech; but again this is but a disguised way of limiting existing state rights contrary to section 103.

The underlying difficulty is Congress's simplistic conception of individual rights as running only against the union and not against other members. This creates the conflict, and it can best be resolved by recognizing that section 103 cannot in such cases carry its full literal meaning. The individual rights provided in the federal law must be fully protected, and other individual rights under state law must be adjusted or even curtailed to the extent necessary to achieve that protection.

Such instances of conflict, though possible, will seldom occur in practical operation, and title I with its anti-pre-emption provision will

[48] There is an additional question whether the defendant in a state defamation action can claim that this statement was federally protected as fair comment under § 101 (a)(2). Section 103 is not applicable, for it was intended to protect only rights which related to union membership, and the right against defamation is independent of membership. The court must adjust the competing state and federal interests, and although there is no direct conflict of legal commands, it would seem inappropriate that a federal definition of the bounds of free speech in an area where national interest predominates should be ignored by states in defamation actions.

create relatively few problems of coordinating federal and state law. Congress, while not dealing explicitly with the problems, made its prevailing purpose sufficiently clear to give the courts adequate guides for performing their traditional function of resolving potential conflict or divergence between the two bodies of law.

TITLE II—REPORTING

In sharp contrast to the broad savings clause in title I and the predominant policy of permitting concurrent state regulation, section 205(c) pre-empts the state from requiring any person to furnish any information included in a federal report.[49] The wording and meaning of this provision is as puzzling as its parentage is obscure.

The Kennedy-Ives Bill in 1958 contained a provision requiring the Secretary of Labor to make available to state officers copies of reports filed by unions or employers under the reporting requirements.[50] When Senator Kennedy submitted his revised bill in January, 1959, there had been added the following:

> No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to provisions of this title if a copy of such report, or a portion thereof, is furnished to such officer or agency.[51]

No explanation was ever given of the purpose of this provision, and it was completely overlooked throughout the legislative debates.[52]

Presumably, its purpose was to protect unions from being burdened with multiple reporting requirements. That burden would be particularly onerous if the reports required varied from state to state.

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[49] "The Secretary shall make available without payment of a charge, or require any person to furnish to such State agency as is designated by law or by the Governor of the State in which such person has his principal place of business or headquarters, upon request of the Governor of such State, copies of any reports and documents filed by such person with the Secretary pursuant to section 201, 202, or 203, or of information and data contained therein. No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency."

[50] S. 3974, 85th Cong., 2d Sess. § 104(c) (1958). This provision was substantially the same as the first sentence in the present provision quoted *supra* note 49.

[51] S. 505, 86th Cong., 2d Sess. § 104(c) (1959).

[52] The section-by-section analysis accompanying the bill merely paraphrased the section. 105 Cong. Rec. 817 (daily ed. Jan. 20, 1959). The Senate Committee Report did not mention this change, and in its section-by-section analysis again paraphrased it. S. Rep. No. 187, 86th Cong., 1st Sess. (1959). The same was true of the House Committee Report. H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959). The trusteeship title requiring reports, incorporates by reference all of § 205(c). See § 301(b).

One report should be enough, and the state's interest in obtaining the information could be satisfied by furnishing a copy of that report. If this was the commonly understood purpose, it could explain the total lack of legislative discussion.

Unfortunately, the words are ill-designed to achieve that end for they say both too much and too little. First, they bar more than state reporting laws; they bar a state from requiring any person to "furnish to any officer or agency of such State any information included in a report." For example, in *Bell v. Waterfront Commission*[53] a subpoena was resisted on the grounds that the information sought by the state agency had been included in a report filed under title II; and the state was pre-empted by the explicit words of section 205(c). Compelled to override these words, the court used section 603(a) and the predominant statutory policy against pre-emption. This, however, gives no guide as to what, if anything, is left within section 205(c).[54] Judicial declarations that the section "implies that state agencies may continue to keep themselves informed as to matters in the scope of the federal statute,"[55] leap-frog the troublesome words, and statements such as "when Congress wanted to displace state law it knew how to do so,"[56] provide less light than humor.

On the other hand, the words of section 205(c) do not prohibit states from requiring different reports; indeed, this is the only kind which the words permit. The state cannot require "information included" in the federal report, but it is not barred from requiring additional or more detailed information, or even a breakdown in different categories. Each of the fifty states could require reports as long as they were careful not to duplicate the federal report. The words on their face contradict the presumed purpose of protecting unions from the burden of multiple and varied reports.

New York has sought to deal with this gremlin clause by inverting

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[53] 183 F. Supp. 175 (S.D. N.Y. 1960).

[54] The application of § 205(c) may be limited by § 604, which provides: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes." This would seem to override even an explicit pre-emption clause such as § 205(c). The crimes listed, however, are probably exclusive, for the intention was to carefully limit this clause to prevent states from overriding pre-emption by enacting criminal statutes. 105 Cong. Rec. 5991 (daily ed. April 24, 1959).

[55] Bell v. Waterfront Commission, 279 F.2d 853 (2nd Cir. 1960) (opinion granting motion to stay pending appeal).

[56] *Ibid.* On appeal, the subpoena was upheld, but this particular point was never mentioned. 279 F.2d 853 (2nd Cir. 1960).

its words. The New York Fiduciary and Reporting statute,[57] adopted just prior to the federal act, provides that the Industrial Commissioner shall accept in lieu of the state report a duplicate copy of the federal report if it contains substantially equivalent information and is verified by the officers.[58] The purpose of this provision was to avoid burdening unions with different reports, but at the same time to enable the state to investigate the accuracy of the reports and prosecute wilfull falsification.[59] After the federal act was passed, the state reporting forms were modified to conform substantially with the new federal forms. The Industrial Commissioner, with reasoning similar to that used by the court in *Bell v. Waterfront Commission,* took the position that section 205(c) does not pre-empt the states from requiring parallel reports and making false reporting a state offense.[60] This sensibly accommodates the national interest in protecting unions against undue accounting burdens with the state interest in discovering and prosecuting misuse of union funds or violations of fiduciary obligations, but it scarcely fits the words of the section.[61]

The courts are confronted with a provision so obviously misdrafted that if applied according to its terms, it will defeat both federal and state interests and serve no positive values. The courts have an obligation to reconstruct the section to achieve its presumed purpose and to work out the practical adjustment required by the federal system. The balance of interests made by New York provides an appropriate starting point.[62]

Union members who seek to inspect the union's books and records may have both state and federal remedies. Under section 201(c) the federal right is limited to examining records "necessary to verify" reports filed under the statute. The state right may not be so circum-

57 New York Labor And Management Improper Practices Act, N.Y. Labor Laws, Art. 20A, §§ 720-732.

58 Section 726(5).

59 Interim Report, Governor's Committee on Improper Labor And Management Practices, at 21-22 (1958).

60 Labor And Management Improper Practices Act, New York State Industrial Commissioner, Opinion No. 1 (Nov. 11, 1959).

61 The forms required under the Connecticut Union Reporting Act, passed prior to the statute, vary from the federal form. This has caused some difficulties, for union members finding differences in the amounts reported on the state and federal forms become suspicious that their officers are juggling the books when they are only trying to comply with diverse requirements. However, Connecticut confusion would seem to fit the words of § 205(c) better than the New York accommodation.

62 It still leaves, however, difficult questions as to the amount of deviation from federal reports that will be permissible without being deemed an undue burden. Certainly, the state should not be obstructed in discovering misuse of union funds at local levels and punishing officers who deceive their members with false reports.

scribed, but this creates no conflict between federal and state law.[63] The limited federal right is a federal minimum fitted to the reporting requirements and does not carry an implication that unions should be protected from additional burdens; section 603(a) plainly preserves the state right.

TITLE III—TRUSTEESHIPS

The statute contemplates three possible remedies in trusteeship cases. First, a local union or its members may sue in the state courts under state law; second, they may sue in the federal courts under federal law; and third, they may file a complaint with the Secretary of Labor who, if he finds probable cause that a violation has occurred, shall bring an action in the federal district court.[64] The only provision coordinating these three remedies, is section 306, which provides:

> The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: Provided, that upon the filing of a complaint by the Secretary the jurisdiction of the district court shall be exclusive and the final judgment shall be res judicata.

The central thrust of title III is similar to that of title I, except that here Congress sought to protect both the local and its members from the international union. Congress was concerned with the abusive use of trusteeships and sought to give increased rights and remedies against that device. Protection under existing law was deemed inadequate,[65] and federal law was needed "to place limits on the reasons for which trusteeships can be imposed and the period for which they may be continued."[66]

Congressional intent to preserve state remedies is evident in the first clause of section 306, but unlike section 103, it does not carry on its face the unilateral thrust of saving only the rights of the local and its members against the international.[67] It purports to preserve "all

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[63] The rights may vary in other respects, but the court can decide whether the member has a right to inspect under either state or federal law. See Henderson v. Sarle, 197 N.Y.S.2d 916, 920 (Sup. Ct. 1960).

[64] Section 304(a).

[65] Protection under existing law was deemed inadequate for three reasons: (1) courts inquired only into the fairness of the procedure and not into the substantive grounds for imposing the trusteeship, (2) members were often intimidated from challenging trusteeships for fear of disciplinary reprisals, and (3) members commonly lack the financial resources to challenge trusteeships in the courts.

[66] S. Rep. No. 187, 86th Cong., 1st Sess. 17 (1959).

[67] The purpose of this sentence in § 306 was stated in the report of the House Committee which gave the section its final form:

"Enactment of the bill will not affect the right of a local union or its members to challenge a trusteeship in the State courts. Section 306 explicitly preserves existing rights and remedies except that the final judgment in any suit brought by the Secretary of

other rights and remedies"—a literal impossibility. For example, an international union which has imposed a trusteeship may bring suit to compel the local to turn over all assets and possession of the union hall. The international may have such rights under applicable state law, but if the trusteeship violates the federal standards, those state rights must fall. The clumsily worded anti-pre-emption clause here must be read like section 102 as saving the rights of the local and its members. It manifests an intent not to occupy the field or preclude state law by implication, but it can not save rights which conflict with those affirmatively protected by the statute.

The same types of problems raised by title I are potential here. First, did Congress at any point contradict its underlying premise of establishing only minimum protection against trusteeship and manifest an intent to protect affirmatively the union's freedom? Committee reports reflect a sensitive awareness that the line between proper and improper trusteeships must be carefully drawn, and that it would "unreasonably impair the independence of labor unions to allow much scope at this point for government to review the judgment of union officials."[68] Title III has many earmarks of a comprehensive code, and there is some incongruity in allowing states to impose different and potentially more restrictive standards.[69] Section 306, however, clearly bars any general pre-emption, and there is no basis in legislative history to give any particular provision special pre-emptive effect.

Second, the rights sought to be protected, those of the local and its members, may compete or clash. If a local union is torn by bitter factionalism, some members may claim a right under the constitution

Labor will bind both the union and the members. Individual union members will therefore have a choice between suing in the State courts under the common law or invoking the provisions of the federal statute." H.R. Rep. No. 741, 86th Cong., 1st Sess. 15 (1959).

[68] S. Rep. No. 187, 86th Cong., 1st Sess. 16-19 (1959).

[69] Contrary to the apparent assumption of the congressional committees, state court decisions give greater protection in at least one respect. State courts have regularly upset trusteeships for failure to comply with procedural requirements of the constitution or lack of a fair trial. See Fanara v. Teamsters, 128 N.Y.S.2d 449 (Sup. Ct. 1954); Garcia v. Ernst, 101 N.Y.S.2d 693 (Sup. Ct. 1950); United Bhd. v. Carpenters Local 14, 178 S.W.2d 558 (Tex. Civ. App. 1944). The procedural defect may actually be a disguise for upsetting the trusteeship on substantive grounds. See Schrank v. Brown, 192 Misc. 80, 80 N.Y.S.2d 452 (Sup. Ct. 1948); 192 Misc. 603, 81 N.Y.S.2d 687 (Sup. Ct. 1948); 194 Misc. 138, 86 N.Y.S.2d 209 (Sup. Ct. 1949). The federal statute, § 304(c), does not require conformity with the procedural provisions of the union constitution, or even any hearing at all. Such procedural defects merely deprive the international of the benefit of a presumption of validity and apparently do not create the adverse presumption of invalidity.

There is at present no effective state legislation limiting trusteeships, but such legislation, if passed, might well be far more restrictive than the federal statute.

to have a trusteeship established to save the local and re-establish orderly democracy; but others may claim a right under federal law to local autonomy and unobstructed democratic process. Resolution of this clash, as in title I, requires frank recognition that in spite of the unqualified words of section 306, federal law is supreme, and when such a clash occurs state law must fall.

The unique element in title III is the second clause of section 306 providing that upon the filing of a complaint by the Secretary, the jurisdiction of the district court shall be exclusive and the final judgment shall be res adjudicata. Under this provision, a state court (or federal court) may be suddenly shorn of its jurisdiction in mid-process, for the filing of the Secretary's complaint invokes pre-emption as against state law, and primary jurisdiction as against private suits in state courts.

This novel displacement in mid-process raises a number of questions, probably more perplexing conceptually than practically. If the displaced court has issued a temporary injunction, or even a permanent injunction which has not become a final judgment, this injunction would be dissolved by the Secretary's action. The Secretary, however, could seek to prevent denuding a local of existing judicial protection by requesting a temporary injunction preserving the status quo pending the determination of the suit.[70] The danger of displacement is that in some circumstances state law may give greater protection to the local than federal law,[71] and those in fact supporting the trusteeship might file a complaint with the Secretary in hopes of using him as an unwitting pawn to escape state remedies. The simple answer is that the local and its members are entitled to the highest level of protection available, so that as long as state courts are giving adequate protection, the Secretary need not and should not intervene. If the state remedy ultimately fails, he can then find that "the violation has not been remedied" and proceed. The Secretary's function is not to vindicate a public right but to sue on behalf of the local and its members to relieve them of the financial costs and dangers of reprisals.[72]

If the private suit is based on federal law, either in the federal or state courts,[73] the Secretary's protective role is somewhat different. Final judgment on the statutory cause of action would seem to be res

[70] Section 304(a) authorizes the Secretary to seek "such relief (including injunctions) as may be appropriate." This was clearly intended to make available temporary injunctions if necessary. S. Rep. No. 187, 86th Cong., 1st Sess. (1959).

[71] See *supra* note 69.

[72] See Statement by Professor Cox, Senate Hearings (1959), *supra* note 22, at 132.

[73] For discussion of the question whether federal rights can be enforced in state courts, see *infra*.

adjudicata as against the Secretary as much as against the local and its members for whose benefit he acts.[74] If members who are dissatisfied with the way the private action is being prosecuted file a complaint with the Secretary, he might properly displace the private action if he believed it necessary to insure that the members obtained full protection of their federal rights.[75]

The provision making final judgment in the Secretary's action res adjudicata presents bothersome ambiguities. Its purpose was twofold: one, to make clear that the Secretary's action would bind both the union and its members;[76] and two, to foreclose subsequent private suits under state law which might be more favorable.[77] Ambiguities arise because the trusteeship title regulates at two levels. It not only limits the purpose for which trusteeships can be established and maintained, but it also prohibits certain conduct during a concededly valid trusteeship.[78] Thus, the Secretary may not only sue to dissolve the trusteeship, but may sue to prevent the international union from counting the votes of delegates who have not been elected by the local, or prevent the transfer of local assets to the international.[79] Section 306 fails to distinguish between these two types of suit, but boldly says that when a complaint is filed jurisdiction becomes exclusive "over such trusteeship." Literally applied, a suit by the Secretary to enjoin the transfer of funds would permanently block private suits to challenge the trusteeship; and the Secretary's testing of the trusteeship would foreclose private actions to protect the local's funds. This would require the Secretary, if he filed a complaint of any kind, to assume full responsibility for testing the validity of the trusteeship and monitoring its administration. Such results can be avoided and the purposes of the provision fulfilled by limiting the pre-emptive effect of the Secretary's action to the type of violation alleged in his complaint; and making

74 Trusteeship cases, by their nature, raise prickly problems of class actions and the effect of such actions to bind all members of the class. These nettles are left for nimbler fingers. The limited point here is that if final judgment is binding on the local and all of its members, its ties cannot be loosened by the Secretary.

75 He might fear that the plaintiffs could not finance necessary investigation, litigation costs, or ultimate appeals, or he might even sense half-heartedness or suspect collusion.

76 S. Rep. No. 187, 86th Cong., 1st Sess. 19 (1959).

77 Private suits in trusteeship cases brought in the federal courts on federal rights would not be res judicata as to subsequent suits brought in state courts on state rights, unless the state right is enforceable in the federal court and therefore could be raised in the first suit.

78 Section 303.

79 Section 303 contains criminal sanctions, but § 304 contemplates enforcement also through a suit by the Secretary. Only violations of the reporting requirements are not enforceable through this procedure.

res judicata no broader against private suits than it would be against the Secretary himself.

TITLE IV—ELECTIONS

The relationship of federal and state remedies in union elections is totally different from that in other areas, for title IV proceeds from opposite premises. In direct contrast to titles I and III, which permit each state to superimpose its rights and remedies on a federally guaranteed minimum, title IV constitutes a comprehensive code which is to provide a single uniform body of law. Congressional purpose was made plain in the Senate Committee Report:

> There is a great need for uniformity in the laws governing union elections. International and national unions operate in many States. It would be confusing, unduly burdensome, and often impossible for them to comply with a variety of election laws. The same considerations apply, with somewhat lesser force, to local unions, a considerable number of which function in several States. Also, the burden of checking compliance will fall upon the international union. It is easier to enforce one uniform rule than a crazy quilt of State legislation and court decisions. Ill-considered State laws would interfere with the national labor policy. Too stringent laws would handicap unions in dealing with employers. Too frequent elections may keep a union in a state of turmoil and could result in instability in collective bargaining relationships with employers.[80]

The purpose was uniformity to be achieved by supplanting state substantive law with a complete body of federal law. The substantive rules governing elections have two distinct sources under section 401 —statutory standards, and the union constitution. Section 401 prescribes a web of specific rules designed to guarantee fair and democratic elections. It also requires that "The election shall be conducted in accordance with the constitution and by-laws of such organization insofar as they are not inconsistent with the provisions of this title."[81] Section 402(a), in providing for enforcement, recognizes these two sources of substantive law.[82]

The entire body of law drawn from these two sources is federal law, imposed by the federal statute and enforced in the forums designated by the statute. The first sentence of section 403 makes this body of federal substantive law exclusive:

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[80] S. Rep. No. 187, 86th Cong., 1st Sess. 21-22 (1959).

[81] Section 401(c).

[82] The section provides that "A member of a labor organization . . . may file a complaint with the Secretary . . . alleging the violating of any provision of Section 401 (including violation of the constitution and by-laws of the labor organization pertaining to the election and removal of officers)."

> No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this title.[83]

State substantive law is pre-empted; the single uniform body of law is that imposed by the statute.

The picture is blurred by the awkward wording of the second sentence of section 403, for it seems to contradict the first sentence by preserving "Existing rights and remedies to enforce the constitution and by-laws of a labor organization with respect to elections prior to the conduct thereof." Confusion is added by the third sentence which reasserts the principle of uniformity, "The remedy provided by this statute for challenging an election already conducted shall be exclusive." Standing alone, these might be read as allowing states to apply their own substantive law, at least so far as their law enforced the union constitution, in actions brought prior to the election, but pre-empting state law after the election. This would lead to the anomalous result that the applicable substantive law would depend on the date the action was brought. The same conduct, such as restricting nominations, declaring candidates ineligible, or fixing the date and place of election, would be governed by state law in pre-election suits and by federal law in post-election proceedings.

Such a reading out of context which blunts the thrust for uniformity is not required by the legislative history, nor does it help fulfill the purpose for which the second sentence was included. As mentioned earlier,[84] the Kennedy-Ives Bill in 1958 provided only a post-election review and barred all other rights and remedies. Objections to this clause were based in principal part on the need for pre-election remedies to correct or prevent violations before the election was held. Upsetting an election was a poor substitute for obtaining a fair election in the first instance. The ACLU and others pointed out that speedy pre-election remedies were available in state courts and urged that this remedy be preserved. The concern was not with substantive law but available procedures; even the most comprehensive code would be incomplete without this remedy to enforce it.[85]

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[83] The remainder of the section is as follows:

"Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

[84] *Supra* p. 120.

[85] S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959). For the great importance placed by Congress on providing for pre-election remedies, see 105 Cong. Rec. 6032 (daily ed. April 25, 1959).

The central purpose of the second sentence of section 403 was to keep available prompt pre-election remedies, not to preserve state substantive law.[86] State courts were retained as a proper forum for suits prior to the election. After the election, the exclusive procedure is a suit in the federal district court brought by the Secretary. The election does not work a change of substantive law, but a change of appropriate forum. Before the election, speed is of the essence and the relief sought is correction of specific defects; this is entrusted to the faster direct suit in equity. After the election, correction is possible only by ordering a new and supervised election; this is entrusted to a slower and more considered procedure of investigation and suit by the Secretary.

Section 403 can thus be interpreted to avoid internal contradiction and fulfill the various purposes of its separate sentences. The first sentence makes the federal law, drawn from the statutory prescriptions and the union constitution, the exclusive body of substantive law. The second and third sentences allocate the enforcement of that law to two distinct remedies—one to prevent the violation before it is accomplished, and the other to redress the evil by holding a new election.

This understanding of section 403 gives guidance in solving the most critical problem of the section—scope of pre-election remedies. If a candidate is disqualified in violation of the union constitution, the state court can order his name restored to the ballot; this is plain on any reading of the second sentence. However, if he is declared ineligible for non-payment of dues in full compliance with the constitution but in violation of the check-off clause of section 401(c), the words of the second sentence cause difficulty. It mentions only "existing rights and remedies to enforce the constitution," and not remedies to enforce the statute. The primary concern of the drafters, however, was to save the already available pre-election remedy, and the only "existing" remedy was to enforce the constitution. Mention only of this, under the circumstances, does not show an intent to bar pre-election remedies for other violations of the statute. It would be strange, indeed, to find that Congress intended that deviations from the union's constitution would be subject to more effective sanctions than violations of congressionally created rights, and that those rights which were deemed so basic as to be prescribed by statute were to be enforced only by a procedure which Congress considered inadequate.

When a state court gives a pre-election remedy for violation of the union constitution, it enforces federal substantive law. There is no

[86] In describing the impact of § 403 in preserving access to state courts, Senator Kennedy said, "Prior to the day of an election an individual can sue in a State. The day after the election the Secretary assumes jurisdiction." 105 Cong. Rec. 5821 (daily ed. April 22, 1959).

reason why it should not enforce the full body of federal law regardless of the source.[87] This conforms to the legislative history, fulfills the congressional purpose, and fits the words of section 403. The last sentence of the section points in the same direction.[88] The only case in which the statutory remedy is exclusive is in the challenging of an election already conducted. In all other cases, the federal right may be enforced by whatever remedies are appropriate, which includes particularly the pre-election remedies on which Congress heavily relied.[89]

Actions to compel the holding of an election, as contrasted with actions to challenge an election, are caught in a crossfire of words and intent as to what is the proper forum and procedure. An order to compel an election is, in a dryly literal sense, a "remedy . . . prior to the conduct thereof." The second sentence of section 403, however, was never intended to save such actions, but to save only remedies to perfect a pending election. No one ever questioned the adequacy of the statutory remedy in section 402 to compel the holding of an election. The third sentence makes this statutory remedy exclusive for "challenging an election already conducted," but this does not necessarily imply an intent that the direct counterpart should not be exclusive. Both the action to compel and the action to challenge an election have common factors distinct from pre-election remedies. Both cast doubts on the status of incumbent officers; both require the holding of an election with the union subjected to substantial cost and

87 During the debates, Senator Prouty raised the question what procedures were available to enforce statutory requirements in elections, and rejected the setting aside of the election as an adequate remedy. Senator Kennedy, in answering, declared, "If the breach should occur prior to the date of the election, of course State remedies would be available. If the breach should occur after the date of the election, the Secretary would have power to set the election aside." 105 Cong. Rec. 5866 (daily ed. April 23, 1959).

88 If the third sentence is construed to mean that the only remedy to enforce statutory rights is to challenge an election already conducted, it would contradict the clear intent of § 402 providing for proceedings to compel the holding of an election or to remove an officer.

89 Pre-election remedies would seem to be available in both state and federal courts. It is true that the title contains no clause granting jurisdiction to the federal courts, but this is not necessary, for the federal courts have general jurisdiction to enforce federal rights and Congress did not expressly preclude them. A cloud is cast by the provision in § 401(c) expressly declaring that a candidate's right to have campaign literature and to have equal access to mailing privileges and membership lists are enforceable in the federal district courts. This was added during the Senate debate as a part of the adoption of the Bill of Rights. There was no evidence that this was added to give these rights greater protection than other rights created by this title. 105 Cong. Rec. 6031-33 (daily ed. April 25, 1959). It would be strange to find that a candidate could have a pre-election remedy to enforce his right to mail campaign literature, but no such remedy to enforce his statutory right to be a candidate. The senators manifested considerable confusion in this area, but they did not manifest a compelling desire for such whimsy.

internal turmoil; and section 402 contemplates that the Secretary shall supervise the election. All of these give the role of the Secretary as the moving party special significance. The principle of primary jurisdiction and the policies on which it rests argue for an interpretation that any order requiring an election to be held must be based on the procedures prescribed by section 402.[90]

Spliced into title IV are vagrant provisions designed to insure that local union officers be vulnerable to removal for serious misconduct. If the local constitution lacks adequate procedures, they may be removed after hearing by a vote of the members. A member may complain to the Secretary either that the constitutional provisions have been violated, or that they are not adequate. The Secretary can then bring an action to compel compliance with the constitution, or if he finds it inadequate, to require the union to follow the statutory procedure. There is no need here to explore the unlighted labyrinths of these provisions,[91] for we are concerned only with the relative roles of state and federal courts.

Section 403 seems to have no application to officer removal cases since it deals only with elections, and the general savings clause of section 603(a) would seem to apply. A member who claimed violation of the constitution could bring a private suit to enforce his "contract" as well as file a complaint with the Secretary. A claim that the procedure was inadequate, however, could be enforced only through the Secretary, for he has primary jurisdiction of the threshold question of adequacy.

The officer removal provisions create a conflict of rights since the statute vests in the member a right to remove an officer; but the officer, too, is a member with both federal and state rights. Furthermore, other members who elected him have a right that he be allowed to serve. A local president removed by the executive board on charges of misconduct may be ordered reinstated by a state court because the board was biased or failed to prove his guilt. This right is saved for him by section 603(a); however, if a member then files a complaint with the Secretary who finds the procedure not adequate, the officer can be retried and removed by a vote of the members. The fact that this procedure did not comply with the constitution would not entitle

[90] The sweeping language of § 603(a) causes momentary pause, for it purports to save all rights to which union members are entitled under any other federal law or law of any state, "except as explicitly provided to the contrary." However, as it has been pointed out, the first sentence of § 403 expressly pre-empts state law in election cases and supplants it with federal law. There is no state law remaining on which § 603(a) can operate.

[91] See, *e.g.*, the multitude of puzzling problems suggested by Senator Goldwater. 105 Cong. Rec. 9115 (daily ed. June 8, 1959).

the officer to claim a violation of his "contract" in the state court. The federal right must prevail, and even the adamant words of section 603(a) cannot save state rights which conflict.

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

This title includes three areas which present problems of coordinating state and federal law: fiduciary obligations of union officers;[92] bonding;[93] and prohibitions against certain persons holding office.[94] Title V has no separate savings clause itself, but the general savings clause of section 603(a) is applicable.

A. Fiduciary Obligations of Union Officers

The debate on these provisions re-echoed many of the same themes that ran through the debate on title I. Congress recognized that state law imposed substantial fiduciary obligations on union officers, but experience had proven state law standing alone to be inadequate. Congress therefore sought to establish a federal minimum and to enforce it with federal remedies without reducing any obligations imposed by state law.[95] Indeed, the very words of section 603(a) originated as a savings clause incorporated in the fiduciary obligation provision added during the Senate debates, and the words "responsibilities . . . of any officer" were included in that clause for the very purpose of preserving state fiduciary obligations.[96]

The fixing of a federal standard, therefore, carried no implication that this was the maximum obligation with which union officers should be burdened. The state is free to establish a higher standard and to enforce it with more vigorous sanctions. For example, the New York statute[97] allows for prohibition of transactions not forbidden by federal law.[98] It holds third persons liable who knowingly participate in conflict of interest transactions,[99] permits suit without leave of court,[100] and imposes criminal penalties for wilfull violations,[101] even though these may go beyond the federal remedies. In short, the union officer must measure up to both standards, subject to the sanctions of each or both.

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92 Section 501.

93 Section 502.

94 Section 504.

95 105 Cong. Rec. 5856-61 (daily ed. April 23, 1959).

96 105 Cong. Rec. 5860 (daily ed. April 23, 1959).

97 New York Labor And Management Improper Practices Act, *supra* note 57.

98 *Id.* §§ 722, 723. The New York statute is much more detailed and defines certain transactions as constituting a conflict of interests.

99 Sections 724, 725-3.

100 Section 725-1.

101 Section 725-4.

Federal and state law can create clashing obligations. For example, in the sale of a union hall, the highest bidder may be a syndicate in which a local officer has an interest. Under state law this may not create a conflict of interest but rather impose a fiduciary obligation on the executive board to accept the highest bid. Under federal law such a sale may be prohibited as constituting an unlawful conflict of interest. The conflict must be resolved here as elsewhere by enforcing the federal obligation, even though it limits the state obligation contrary to the plain words of section 603(a). If the situation is inverted, however, with the transaction prohibited by state law but permitted by federal law, the state prohibition would seem to prevail. Thus, if state law limited investment of union funds to legal securities, union officers could not excuse other investments on the ground that section 501 obligated them to benefit the members by making investments with greater return or in particular projects such as low cost housing in which the members had a special interest. Congress manifested no intent to impose on union officers an obligation to enter into transactions prohibited by state law, but rather sought to increase the safety of union funds and reduce the risks of conflicts of interest.

State law imposing fiduciary obligations may be pre-empted by other federal law, for section 603(a) protects against pre-emption only under "this act." For example, if a union officer received a bribe for signing a collective agreement, state law might allow rescission; however under the *Lincoln Mills*[102] doctrine, the validity of the collective agreement is governed by federal law and state law is pre-empted. Similarly, state law restricting the use of union funds for secondary boycott or organizational picketing would seem to be pre-empted as a state regulation of concerted activities.[103]

B. Bonding

Section 502 requiring bonding of union officers was not intended to establish a federal minimum to undergird state law. It represents the considered weighing of the need to protect union funds and the need to avoid undue burdens on unions. Standing alone, it would carry

[102] Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

[103] Compare San Diego Building Trades Council v. Garmon, *supra* note 10. More difficult problems would arise if the state narrowly restricted the use of union funds for political purposes. It would seem not to be pre-empted by § 304 of Taft-Hartley amending the Corrupt Practices Act, for it reaches only contributions or expenditures in connection with a federal election. However, if the political expenditure "relates . . . to the work of the union in the realm of collective bargaining," or is "germane to collective bargaining," Railway Employees Department, AFL v. Hanson, 351 U.S. 255 (1956), it might be argued that the state could not thus impair the union's effectiveness as a statutory bargaining agent.

the implication that additional burdens were not to be imposed, and that states were precluded from superimposing their own bonding requirements. The words of section 603(a), however, seem to bar such pre-emption. There is serious doubt whether separate state bonding was one of the "responsibilities of labor organizations" that Congress intended to preserve, but the emphatic words of the section are difficult to escape without the aid of explicit words, or a conflict between state and federal obligations which makes it impossible to fulfill both.

State bonding requirements might possibly be attacked as burdening and obstructing unions in exercising their rights under the NLRA. To sustain such an attack, the state requirement would have to be shown to be vindictive or onerous out of all proportion to any state interest.

C. Prohibition Against Certain Persons Holding Office

The fact that Congress in section 504 has limited the right of former communists and felons to hold union office does not preclude states from imposing stricter limitations on such persons. In *DeVeau v. Braisted*,[104] a man who thirty years before had pleaded guilty to attempted grand larceny was disqualified from holding union office under the New York Waterfront Commission Act. Although the state law disqualified one for crimes not listed in section 504 and the disqualification was not limited to five years, the Supreme Court held that the state law was not pre-empted by the federal statute. It buttressed its conclusion with these supports:

> The fact that Congress has thus imposed the same type of restriction . . . is surely evidence that Congress does not view such a restriction incompatible with its labor policy;[105] When Congress meant preemption to flow from the 1959 Act it expressly so provided . . . . No such preemption provision was provided in connection with Section 504 (a);[106] Section 604 provides that nothing in the Act shall restrict state criminal enforcement of the same felonies listed in Section 504; and Section 603 (a) is an express disclaimer of preemption of state laws regulating the responsibilities of union officials except where such preemption is expressly provided in the 1959 Act.[107]

The Supreme Court also held that the New York statute was not pre-empted by the National Labor Relations Act, for it was based on an interstate compact ratified by Congress with full knowledge and

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104 363 U.S. 144 (1960).

105 *Id.* at 156.

106 *Ibid.*

107 *Id.* at 157.

consent to the implementing legislation. *Hill v. Florida*[108] was distinguished for here there was "Congressional approval of the heart of the state legislative program explicitly brought to its attention and was part of a program, fully canvassed by Congress through its own investigations to vindicate a legitimate and compelling state interest."[109]

This decision does not, of course, settle the question whether in the absence of such a compact, a state could regulate qualifications for union office. Other language suggests that a state may be be able to "restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.' "[110] Furthermore, enactment of section 504 evidences that "Congress does not view such a restriction as incompatible with its labor policy"[111] and this might weigh heavily in the "adjustment" of interdependent federal and state interests. State disqualification of prior communists and felons might well be upheld, but disqualification on other grounds would seem not to be compatible with Congressional policy and be pre-empted by the NLRA.[112] In the words of the Supreme Court:

> The fact that there is some restriction due to the operation of state law does not settle the issue of preemption. The doctrine of preemption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and the interaction of federal and state powers.[113]

Dual Rights and Dual Constitutions

Under the statute, certain federal rights are dependent on provisions in the union's constitution. Equal rights can be qualified only by reasonable rules in the constitution;[114] trusteeships can be imposed only for purposes so provided;[115] elections must be conducted according to the union's constitution;[116] and union funds can be used only

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108 *Supra* note 1.

109 DeVeau v. Braisted, *supra* note 104, at 155.

110 *Id.* at 152.

111 *Id.* at 156.

112 In Hill v. Florida, *supra* note 1, the Court emphasized that Florida not only prohibited the disqualified business agent from serving but also enjoined the union from functioning as a bargaining representative under the federal statute. Neither the majority nor dissent in *DeVeau v. Braisted* used this element to distinguish *Hill v. Florida*. Both ignored this element and treated the mere disqualification of an officer as a restriction on free choice of representatives.

113 DeVeau v. Braisted, *supra* note 104, at 152.

114 Section 101(a)(1).

115 Section 302. Failure to follow the procedure required by the constitution destroys the presumption of validity. Section 304(c).

116 Section 401(a). Officers can be removed only in accordance with the constitution unless the Secretary has found that procedure inadequate.

in conformity to that organic law.[117] At the same time, state rights are also governed by the constitution—indeed, the major task of state law is to enforce compliance with the union's own rules.

The union constitution, however, is not a mathematical formula, but a vague, incomplete, and ambiguous document requiring judicial interpretation. On this federal and state law might differ. For example, ambiguous wording defining the purposes for which union money can be spent might be interpreted in a federal court as authorizing loans to a hardpressed employer but interpreted in a state court prohibiting such a loan. Similarly, an amendment to the constitution reasonably qualifying equal rights might be found to be validly ratified under state law but invalidly ratified under federal law. This presents the problem how these potentially different interpretations should be handled.

Three alternatives are available. First, the law under which the particular right was asserted could control. State rights would be governed by state construction rules and federal rights, by federal construction rules. This is conceptually awkward because the union then has not one constitution but two. Although awkward it creates no irreconcilable conflict between the two bodies of law. Seldom, if ever, will one interpretation command what the other prohibits; both can be obeyed.[118] If there is, perchance, such conflict it will be resolved as elsewhere in the statute by federal law prevailing.

Second, state law could be allowed to control as to the existence or meaning of a constitutional clause. Congress considered the union constitution as the main core of the state law to be preserved and it found no fault in state court interpretation of it. Allowing state law to control on this point would not weaken basic guarantees because the constitution, so interpreted, will still be subordinate to the federally declared rights. This alternative, however, seems unfitting in election cases, since pre-emption has eliminated state law in this area and it should not be revived for purposes of interpreting the election provisions.

Third, federal law could be allowed to control. This, however, would work a change far beyond the needs, for apart from election cases, the federal courts will only sporadically have to look to the union constitution, and then only to a minute fraction of its whole.

117 Section 501(a).

118 Divergent interpretations of the procedural provisions for establishing trusteeship could conceivably cause hardship. If the union followed the federal construction, the trusteeship would be invalid under state law; if it followed the state construction, the presumption of validity under federal law would be destroyed. However, the union could usually comply with both interpretations simultaneously.

State courts, on the other hand, must apply the constitution to a wide range of cases far removed from those arising under the federal statute.

In practical terms, there seems little difference between the first two alternatives. Election provisions, because of complete pre-emption, should be governed by federal law in any event. In the other random cases there is not likely to be significant differences in federal and state construction rules. Here, as in so many other federal-state problems under the statute, the difficulties are more conceptual than real.

Dual Rights and Dual Courts

Parallel or overlapping rights and remedies under state and federal law inevitably pose problems of judicial administration. These problems become most acute when those rights are separately adjudicated and enforced by different courts which may duplicate or work at cross-purposes. Reconciling possibly conflicting rights and coordination of potentially clashing remedies are simplified if both sets of rights and remedies are administered by the same court in the same proceeding.

Internal union cases have four marked characteristics which give added reason for fully disposing of the dispute in a single proceeding. First, state and federal rights are often so inseparably intertwined that separate litigation of those rights must inevitably lead to extensive duplication. The rights may be so similar that the trial of one will be a re-run of the trial of the other. Thus, the established state right to a fair hearing parallels the federal right guaranteed by section 101 (a)(5); the Ohio rule of *Crossen v. Duffy*[119] or the New York rule of *Madden v. Atkins*[120] may approximate the free speech protection provided by section 101(a)(3); and the fiduciary obligation under state law may be nearly identical with that imposed by section 501. Separate trial of these federal and state rights would result in complete duplication. Even though the substantive rights differ, the evidence relevant and necessary to adjudicate them may largely overlap. For example, an expelled member may simultaneously claim that he was not given written specific charges as required by federal law,[121] nor were they signed by the accusing member as required by the constitution enforced by state law; that the trial body was biased,[122] and was not named in accordance with the union constitution; or,

119 90 Ohio App. 252, 103 N.E.2d 769 (1951).

120 4 N.Y.2d 283, 151 N.E.2d 73 (1958).

121 Section 101(a)(5).

122 *Ibid.*

that the expulsion was for criticizing the officers,[123] and the charges of dual unionism were not supported by substantial evidence. The trial of one of these simultaneously asserted rights requires almost all of evidence necessary for the adjudication of the other.

The second marked characteristic of internal union litigation is that in practice the evidence typically ranges widely to explore the contours of the underlying dispute. Lawyers commonly seek to present the case not as an isolated incident, but as a part of the union's internal life. A study of the cases show that the courts have been willing to inquire into the background of the dispute and obtain a full picture of the union's challenged conduct.[124] Indeed, the court has no choice if it is to make a meaningful decision and formulate an appropriate remedy. This practice of broad inquiry is further encouraged by the fact that these suits are almost always for equitable relief and tried without a jury. Because of this nature of proof in internal union cases, rights which seem to rest on quite dissimilar elements may lead to the production of identical evidence at the trial; and rights which seem quite remote in legal terms may be supported by evidence which extensively overlaps. The duplication in internal union cases, therefore, is much greater in fact than theoretical analysis suggests.

Third, the costs of litigation substantially affect the reality of the rights afforded. The plaintiff is often a union member for whom the legal costs are a serious obstacle to his asserting his rights. His need is for a single proceeding to adjudicate all of his rights. Duplication works a derogation of his rights, for it adds financial obstacles to his obtaining full protection.

Fourth, the union needs a final settlement of the claimed rights to resolve the internal dispute. Litigation inevitably generates internal turmoil and may be deliberately used by factional groups for political purposes. Piecemeal adjudication prolongs and aggravates the turmoil, often breeding even further litigation. Full adjudication enables the union to take corrective action, if any be required, and return to its primary task of representing its members in collective bargaining.

The primary inquiry here is the extent to which the statute permits or requires both state and federal rights to be determined in the same proceeding. This depends on the ability to enforce state rights in federal courts and federal rights in state courts. This in turn, raises problems of removal from state to federal courts.

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123 See § 101(a)(3).

124 For a study of the practices followed in litigating these cases, see Summers, "The Law of Union Discipline—What The Courts Do In Fact," 70 Yale L.J. 175 (1960).

A. Enforcement of State Rights in Federal Courts

The central question here is to what extent state rights, claimed in conjunction with federal rights, can be adjudicated in the federal courts.[125] This leads immediately to the shadowland of pendent jurisdiction where federal courts may dispose of a case on non-federal grounds even though the federal grounds have not been established.[126] The test of pendent jurisdiction, under *Hurn v. Oursler*,[127] is whether the federal and state claims are "two distinct grounds in support of a single cause of action";[128] and this, in turn, depends largely on the identity of the facts used to prove the two claims.[129]

Where the state and federal claims are substantially similar—such as in cases of discipline for suing the union, denial of a fair hearing, or violation of a fiduciary obligation—there is clearly but one cause of action. If the state standard were higher than the federal standard, the federal court would have pendent jurisdiction to enforce the state right even though the federal right failed.[130]

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[125] The federal district courts have jurisdiction without regard to the amount in controversy under § 1337 of the Judicial Code, 62 Stat. 931 (1948), 28 U.S.C. § 1337 (1958), which gives original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce." For the applicability of this to private suits brought under collective bargaining statutes, see Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 643 (1955); Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

Apart from this, the jurisdictional grant in the statute should be interpreted as being without regard to the amount in controversy, for the rights to be protected, in the main, are not susceptible to monetary evaluation. They are in the nature of civil rights, and requiring a jurisdictional amount would frustrate the clear purpose of Congress to give union members protection in the federal courts. *Cf.* Tenney v. Brandhove, 341 U.S. 367 (1951); Smith v. Allwright, 321 U.S. 649 (1944); Hague v. CIO, 307 U.S. 496 (1939).

[126] See generally, Moore's Federal Practice § 3, at 1815-17 (1st ed. 1948); Note, "Jurisdiction in Federal Courts Over Non-Federal Claims When Joined With A Federal Question," 52 Yale L.J. 922 (1943).

The federal court has jurisdiction even though the complaint fails to state a good cause of action on the federal claim. All that is required for jurisdiction is that the complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States." Bell v. Hood, 327 U.S. 678, 681 (1946). The suit might be dismissed for want of jurisdiction if the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous." *Id.* at 682.

[127] 289 U.S. 238 (1933).

[128] *Id.* at 246. The plaintiff claimed a violation of federal rights under the copyright statute, and a violation of state rights under the common law of unfair competition.

[129] Complete identity of the facts is not required to constitute the same cause of action for the purpose of pendent jurisdiction. It is enough if the facts are substantially identical. This leaves undefined the degree of identity required.

[130] See, *e.g.*, Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949), where plaintiff sued under the Interstate Commerce Act and state common law for negligent damage to

Even though the substantive rights differ, there may still be but a single cause of action.[131] If a trusteeship is challenged because it is not for a permissable purpose under section 302, and also because it was imposed without a hearing as required by state law, the essential facts to support the two grounds are quite different. There is, however, but one wrong to be remedied; and the evidence which the court must in practical terms consider in determining the federal claim will include almost all, if not all, the evidence required to dispose of the state claim.[132] Similarly, a member who claims that his discipline is in reprisal for exercising his statutory rights may also claim that the procedure failed to conform to the union constitution. The two claims are but "two distinct grounds in the same cause of action." There was but one expulsion; he seeks but one reinstatement; and the trial of the federal claim will produce at least nine-tenths of all the facts needed for the state claim.[133]

Whether the federal court has pendent jurisdiction is not a conceptual but a practical problem.[134] The cause of action is not to be measured by legal theories, but by the dispute which the court is required to adjudicate; and identity of the evidence used to prove the two claims must be determined not by examining essential allegations of counts in the complaint, but by examining the evidence practically

livestock. The court held that it had pendent jurisdiction over the state claim even though the federal claim was decided against the plaintiff.

131 See, *e.g.*, Markert v. Swift & Co., 187 F.2d 104 (2d Cir. 1951), where plaintiff claimed the defendant by failing to provide employees uniforms had violated the Federal Meat Inspection Regulations and also a collective bargaining agreement—then considered a state claim. The court at page 107 of the opinion held that although "the legal source of the alleged duty differs, in one case the claim being that it is imposed by federal law and in the other by the common law contracts" there was but a single cause of action and the court had pendent jurisdiction.

132 See, *e.g.*, Jacobs v. North La. Gulf. Ry. Co., 69 F. Supp. 5 (W.D. La. 1946) where an injured employee sued under the Federal Employers Liability Act and the State Workmens Compensation Act. The former required proof of negligence and allowed recovery of full damages, but the latter did not require negligence and limited recovery to a statutory amount. The court at page 8 of the opinion held that "having acquired jurisdiction for the former issue, it would continue for decision of the latter."

133 See, *e.g.*, South Side Theatres v. United West Coast Theatres, 178 F.2d 648 (9th Cir. 1949), where plaintiff in a declaratory judgment action claimed that the contract was illegal under the Sherman Act, and also that it had been cancelled according to its termination clause. The court held that even though the federal ground was not established by the evidence, the court could retain jurisdiction and dispose on the non-federal ground.

134 See Shulman & Jaegerman, "Some Jurisdictional Limitations on Federal Procedure," 45 Yale L.J. 393 (1936); Note, "Federal Jurisdiction Over A Non-Federal Issue When Joined With A Federal Question," 34 Minn. L. Rev. 559 (1950). All of the writing in the field has favored a liberal and practical application of pendent jurisdiction. See also authorities cited *supra* note 126.

required at trial to enable the court to act responsibly and effectively. The need to avoid wasteful duplication of judicial effort, to reduce the costs of litigation for the parties, and to obtain a prompt final settlement of the internal union dispute all require that in these cases pendent jurisdiction not be niggardly granted.[135]

Apart from pendent jurisdiction, federal courts may also adjudicate state rights as a necessary part of adjudicating federal rights. For example, a union member may sue in the federal courts to compel the local officers and the local's attorney to repay legal fees paid to effect a secession of the local. Whether the payment was a violation of fiduciary obligation under federal law may depend on whether the local had a right to secede under state law. The federal court in order to decide the federal claim must also decide the state claim.[136]

B. Enforcement of Federal Rights in State Courts

Legislative history gives no explicit guide on whether actions to enforce federal rights could be brought in state courts. The question was never raised or discussed either in the committee reports or the floor debate. This very silence, however, suggests that Congress had no clear or considered intent to make jurisdiction in the federal courts exclusive.

The statutory language, though ambivalent, points toward concurrent jurisdiction. The enforcement section of the Bill of Rights provides that "Any person whose rights . . . have been infringed . . . may bring a civil action in a district court of the United States . . . ."[137] The clause permitting private suits in trusteeship cases similarly provides that the plaintiff "may bring a civil action" in the federal courts.[138] The use of the term "may" in this context indicates concurrent and not exclusive jurisdiction in the federal courts.[139]

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135 It has been argued that the federal court is not compelled to decide the state question, but has discretion to refuse to decide the pendent issue, and might exercise that discretion when the federal claim is dismissed prior to trial, for this would cause little inconvenience to the parties. See Note, "Discretionary Federal Jurisdiction," 46 Ill. L. Rev. 646 (1951). This overlooks the element of delay which is of special importance in internal union cases, and which should be given weight if the motion to dismiss is not made at an early stage in the proceedings.

136 See, *e.g.*, Marosky v. Bethlehem Hingham Shipyard, 177 F.2d 529 (1st Cir. 1949), where plaintiff sued for overtime pay under the Fair Labor Standards Act. Determining the overtime pay required determining the regular rate of pay under the employment contract which was governed by state law. The court, having decided this state question in order to decide the federal claim, had pendent jurisdiction to award the amount of base pay due under state law.

137 Section 102.

138 Section 304(a).

139 See Moore's Federal Practice at 227-36, 2017 (2d ed. 1959); Note, "Exclusive Jurisdiction of Federal Courts," 70 Harv. L. Rev. 509 (1957).

In two places, the statute expressly provides for concurrent jurisdiction, superficially creating an inference that jurisdiction is otherwise exclusive. The history of these two provisions, however, reverses the inference. One provision, which allowed union members to sue for violation of fiduciary obligations,[140] was added to the Kennedy-Ives Bill during the 1958 Senate debate.[141] At that time it was the only federal right enforceable by private action, and the express provision for concurrent jurisdiction was apparently written out of an excess of caution to require not only federal but state courts to entertain these suits. The other provision, which permitted union members to compel inspection of books and records,[142] was added in the final stages of evolution of the bill by the House Committee in 1959.[143] It was the last private action incorporated into the statute and again expressly provided for concurrent jurisdiction.

Nothing in any of the reports or debates suggests that these two particular federal rights were to be placed on a different footing from other federal rights created by the bill. The variations do not represent purposeful differences, but sporadic excesses of caution disclosing an implicit understanding that all private actions to enforce rights under the act could be brought in either federal or state courts.

No persuasive policies argue against this result. The state courts are fully competent to adjudicate and enforce these rights; they have in fact had far more experience with internal union disputes than federal courts. There is no reason to fear that they will be unfriendly to the federal claims; rather, close study of state cases suggests that they have sought to manipulate the common law doctrines to achieve results approximating the federal rights.[144]

On the contrary, there are strong practical reasons for finding concurrent jurisdiction, the most compelling of which are rooted in the need to adjudicate interlaced federal and state rights in the same proceeding. The plaintiff ought not be driven to double litigation in separate courts simply because his state claim is so separate from his federal claim as to fall outside the pendent jurisdiction of the federal court. Neither should he be permitted to litigate twice the same cause of action based on parallel federal and state claims by first suing on his state right in the state court and then suing on his

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140 Section 501(b).

141 104 Cong. Rec. 11327-29 (daily ed. June 16, 1958).

142 Section 201(c).

143 H.R. 8342, 86th Cong., 1st Sess. § 201(c) (1959). The House Report accompanying the bill, H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959), did not even mention this sub-section, except in its section by section analysis.

144 See Summers, *supra* note 124.

federal right in the federal court. These, however, would follow if the state court lacked concurrent jurisdiction. On the other hand, if federal rights are enforceable in state courts, the plaintiff can combine causes of action and litigate the entire dispute in one proceeding. At the same time, adjudication will bring a measure of repose to the union, for final judgment on a cause of action will be res adjudicata on both the state and federal grounds which could have been relied upon to support it.

In view of the legislative history, reinforced by the compelling practical need on the part of the courts and both of the parties to facilitate the full settlement of the dispute in a single proceeding, it seems reasonably clear that the statute should be interpreted as making federal rights enforceable in state courts.

C. Removal of Actions from State Courts

Actions in the state court can combine a wide range of claims, both federal and state, within the limits of the state's procedural rules permitting joinder of causes of action. Thus, an international union might charge the local officers with corruption, remove them from office, install a trustee and order the local consolidated with another local, and then discipline members who refused to cooperate. The officers and disciplined members might sue in the state court to enjoin the consolidation, remove the trusteeship, recover union office and reinstate the disciplined members. If the complaint alleges any violation of the federal statute, the whole action can be removed by the defendant to the federal court.[145]

A state claim paralleling an asserted federal claim and constituting but a distinct ground in support of a single cause of action within the meaning of *Hurn v. Oursler*,[146] would be removable on the basis of original federal jurisdiction.[147] State claims which constitute separate and independent causes of action would be removable along with the other claims,[148] but the federal court could in its discretion remand

[145] No amount in controversy is required for removal because the federal court has original jurisdiction regardless of the amount in controversy, *supra* note 125. See Moore's Commentary On The U.S. Judicial Code 228 (1949).

[146] 289 U.S. 238 (1933).

[147] 62 Stat. 937 (1948), 28 U.S.C. § 1441(b) (1958). See Lewin, "The Federal Courts' Hospitable Back Door—Removal of 'Separate And Independent' Non-Federal Causes of Action," 66 Harv. L. Rev. 422, 424-26 (1953).

[148] 62 Stat. 937 (1948), 28 U.S.C. § 1441(c) (1958). Removal under this subsection includes cases in which federal jurisdiction over the non-state cause of action is based on a federal question. Note, "Removal Under Section 1441(c) of The Judicial Code," 52 Col. L. Rev. 101 (1952). It has been suggested that certain intermediate types of state claims might be considered as separate causes of action under *Hurn v. Oursler, supra*

those claims to the state court. In exercising that discretion, one of the critical considerations should be the enveloping nature of proof in these cases and the need for the courts to inquire into the underlying dispute within the union which gave birth to the litigation. In practical terms, there is but a single dispute with multiple maneuvers and counteractions. To parcel up the dispute according to concepts of cause of action will result in trying it piecemeal and defeat all the values which have been emphasized above for adjudicating the whole dispute in a single proceeding.

CONCLUSION

The Labor Reform Act marks a new frontier in the law of preemption, for it represents a serious effort by Congress to define and coordinate the relative roles of federal and state law through statutory provisions. Congress had few guides to follow, but the exploratory efforts here may provide experience which will give guides for the future.[149]

Congress did not, and could not, work out in detail the coordination of federal and state law. To do so would require at the very least a comprehensive knowledge of existing state law and the kinds of cases which came before the courts. Furthermore, it would require a clear understanding by Congress of what it was prescribing as federal law. Congress lacked both of these since such precision of knowledge and understanding is not possible. State law in this area is amorphous and deceptive, burdened with outworn doctrines and "Janus-faced" rules. Any statute must be cast in flexible terms to be fitted to the needs of the unlimited variety of problems which may arise. Congress, then, was confronted with the task of coordinating two bodies of law whose contents were inevitably imprecisely known. The most that it could do was to indicate in broad terms the pattern of coordination and adjustment.

This leaves a large job for the courts; they must work out the details of coordination and make the adjustment in particular cases. The courts' role is the customary one of elaborating legislation. It is peculiarly appropriate here, for courts have a special responsibility to coordinate competing bodies of law subject to review by the Supreme Court, the arbiter of the federal system.

The courts, in approaching this task, must recognize that Congress

note 146, but not "separate and independent" under § 1441(c), and neither the state nor federal claim could be removed. Lewin *supra* note 147, at 431. Such an anomalous result would seem unlikely. Where federal jurisdiction was based on federal question, subsection (c) should take up where subsection (b) leaves off. "Removal Under Section 1441(c) of The Judicial Code," *supra.*

did not give them a blueprint with specifications, but rather general guides. Answers can not be distilled from the words of the savings clauses, but must be projected from their broad thrusts of purpose. Neither section 103 nor section 603(a) can be applied literally in all cases, but must be applied to achieve their central purpose of maximum protection of individual rights. The wording of section 403 may be misleading unless it is read in the light of the overriding purpose to create a uniform body of law regulating elections. Above all, the courts have a primary responsibility to make the coordination of federal and state law work to achieve the objectives sought by Congress; and not, out of hostility to the act or its efforts to preserve protections under state law, use the words of Congress to defeat its objectives.

Coexistence of state and federal law obviously presents complex problems, although probably no more difficult and less unsettling than would have been created by complete pre-emption. The preconceived fears of conflict between the two bodies of law appear, upon more careful analysis, to be far less than imagined, because for the most part the two levels of protection do not clash but reinforce and supplement each other. Only in rare situations does one law command that which the other prohibits, and when that occurs the conflict is simply resolved by giving primacy to the federal command. Apart from intricate procedural knots created by enforcement of dual rights in both federal and state courts, most of the difficult problems exist more in the realm of theory and artificial hypotheticals than in the realm of practical reality. None of the problems are beyond the ordinary competence of courts to resolve.